

CALIFORNIA COASTAL COMMISSION

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W13g

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COASTAL DEVELOPMENT PERMIT APPLICATION

Application number3-02-031

ApplicantsDavid Smith & Laurie Miller

Project location6 Dunecrest Avenue, Monterey (APN 011-464-019)

Project descriptionConstruct a two-story 1,440 square foot single-family dwelling with a two-car garage, basement, cantilevered decks, a rooftop deck, a fenced trash area, and retaining walls; grading and removal of approximately 244 cubic yards of sand from site

Local approvalPlanning Commission 12/11/01; Planning Commission approval appealed to City Council; City Council denied appeal 1/15/02

File documentsCoastal Act; Negative Declaration granted 12/11/01; Del Monte Beach Land Use Plan; Botanical Survey Report 7/12/01; Landscape Restoration Plan 3/10/02; Geotechnical Investigation, May 2001

Staff recommendation ...Approval with Conditions

Summary: The Applicants propose to construct a two-story, 1,440 square foot single-family dwelling on a 3,600 square foot lot in an environmentally sensitive dune area. The project site is located on Dunecrest Avenue in the Del Monte Beach area of the City of Monterey and is the one remaining vacant lot along this section of Dunecrest Avenue that currently does not have Commission approval for a single-family residence. The proposed project represents infill of existing development along this roadway.

Coastal Act Section 30240 requires that environmentally sensitive habitat areas (ESHA) be protected against any significant disruption of habitat values, and states that only uses dependent on those resources shall be allowed. The Del Monte Beach dunes, although substantially altered, are considered ESHA because of the known occurrence of plant and animal species native, and restricted to, the Monterey Bay dune system, including those listed as endangered or threatened under Federal and/or State regulations. The project would result in a direct impact to dune habitat and would involve the removal of representatives of one plant species of special concern and one plant species federally listed as threatened. Although non-resource-dependent development in ESHA is not consistent with Coastal Act Section 30240, some development of the site must be allowed to avoid a taking of private property



California Coastal Commission
September 2002 Meeting in Los Angeles

Staff: S. Craig Approved by:

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without just compensation, as provided under Coastal Act Section 30010.

In addition, Coastal Act Section 30250 requires that new urban residential development be located within existing developed areas able to accommodate the development. The City of Monterey, however, has a waiting list for water hookups and the Applicants have been placed on this list.

In light of the constitutional takings issue associated with the proposed development, staff recommends that the Commission approve the proposed residence, with conditions that have been applied by the Commission to similar projects within this tract, to achieve Coastal Act consistency. These conditions include the following requirements:

- Restoration and preservation of at least 50% of the lot as natural dune habitat. This area must be placed under a conservation deed restriction, and be periodically monitored and maintained pursuant to the approved landscape restoration plan;
- Contribution to the City of Monterey dune restoration fund proportional to the cost of restoring an area of dune equivalent to the footprint of the development, as mitigation for the habitat loss attributable to project construction;
- Acknowledgement that this permit, and construction of the permitted development, shall not interfere with any prescriptive or public trust rights that may exist on the property;
- Identification and utilization of a sand disposal site within the Monterey Dunes system approved by the City of Monterey, the project biologist, and the Executive Director;
- Compliance with geotechnical recommendations; and,
- Implementation of specific measures to minimize construction impacts on rare dune plants and animals.

As conditioned, the project will be consistent with Coastal Act Section 30010 and will mitigate for unavoidable impacts to ESHA as much as feasible. In addition, the project is conditioned to require proof of water availability prior to issuance of the coastal development permit and to require that fencing and landscaping that do not impact public views.

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I. Staff Recommendation on CDP Application

The staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development subject to the standard and special conditions below.

Motion. I move that the Commission approve Coastal Development Permit Number 3-02-031 pursuant to the staff recommendation.

Staff Recommendation of Approval. Staff recommends a **YES** vote. Passage of this motion will result in approval of the coastal development permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Approve a Coastal Development Permit. The Commission hereby approves the coastal development permit on the grounds that the development, as conditioned, will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the coastal development permit complies with the California Environmental Quality Act because either: (1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen



any significant adverse effects of the amended development on the environment; or (2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse effects of the amended development on the environment.

II. Conditions of Approval

A. Standard Conditions

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittees to bind all future owners and possessors of the subject property to the terms and conditions.

B. Special Conditions

1. **COMPLIANCE WITH RESTORATION PLAN.** All aspects of project construction and use of the site shall conform to the recommendations contained in the Landscape Restoration Plan prepared by Thomas K. Moss, dated March 10, 2002.
2. **DUNE RESTORATION FUND. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the Applicants shall provide evidence, in a form and content acceptable to the Executive Director, that a fee has been deposited into the City of Monterey's Del Monte Beach Dune Restoration Fund (or equivalent interest-bearing account managed by the City of Monterey) in an amount of \$589 (the cost of restoring an area of dune equivalent to the 1,710 square feet covered by the development, at a restoration cost of \$15,000 per acre), to mitigate for the loss of dune habitat caused by the development. The purpose of the account shall be to provide a dune



restoration fund for the protection and restoration of the Monterey Bay dunes within the City of Monterey. The funds shall be solely used to acquire restoration sites and to implement projects that restore native dune plant habitats (including installation of boardwalks to reduce public access impacts), not to fund operations, maintenance, or planning studies. The funds in the account shall be released as provided for in a memorandum of agreement between the City of Monterey and the Commission, setting forth terms and conditions to assure that the in-lieu fee will be expended in the manner intended by the Commission.

3. OPEN SPACE RESTRICTION.

A. No development, as defined in section 30106 of the Coastal Act shall occur in the Open Space Area as described and depicted on page 1 of Exhibit 5 attached to the Notice of Intent to Issue Permit (NOI) that the Executive Director issues for this permit, except for:

- 1.** Fencing and/or boardwalks needed to accommodate habitat conservation/restoration. Any such fencing shall be designed to avoid substantial impairment of public views, light, wind, and rain. Landscaping that would block public views or introduce nonnative species shall be prohibited. Structures, uses, and activities that would degrade natural habitat values are prohibited.

B. PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOI OF THIS PERMIT, the Applicants shall submit for review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, as generally described and shown on page 1 of Exhibit 5 attached to this staff report.

- 4. PUBLIC RIGHTS.** By acceptance of this permit, the Applicants acknowledge, on behalf of themselves and their successors in interest, that issuance of the permit shall not constitute a waiver of any public rights that may exist on the property. The Applicants also acknowledge that issuance of the permit and construction of the permitted development shall not be used or construed to interfere with any public prescriptive or public trust rights that may exist on the property.
- 5. SAND DISPOSAL. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION,** the Permittees shall identify a disposal site for excavated sand within the Monterey Dunes. The disposal site and proposed method of sand disposal shall be subject to the review and approval of the City of Monterey, the project biologist, and the Executive Director.
- 6. COMPLIANCE WITH GEOTECHNICAL RECOMMENDATIONS. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION,** the Permittees shall submit to the Executive Director, written evidence of compliance with the recommendations contained in the May 18, 2001 geotechnical report from Tharp & Associates, Inc.



- 7. BIOLOGICAL MITIGATION. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION, AND ON A DAILY BASIS PRIOR TO THE COMPLETION OF GRADING,** the project biologist shall conduct a survey for the black legless lizard in the construction area utilizing raking, coverboards, or other biologically acceptable methods. Surveys should be done in the mornings and evenings, when black legless lizards are most likely to be found. If found, the lizards should be captured and immediately placed into containers with moist paper towels, and released in similar habitat on undisturbed portions of the site at the same depth in the soil as when found. Evidence of compliance with this condition shall be prepared by the project biologist and submitted for confirmation by the Executive Director **PRIOR TO THE COMMENCEMENT OF CONSTRUCTION AND AT THE CONCLUSION OF GRADING ACTIVITIES.**
- 8. SPECIAL STATUS PLANT SPECIES TRANSPLANT PLAN. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the project botanist shall prepare a plan for the transplantation of any special status plant species (including Monterey spineflower and Coast wallflower) that will be removed to construct the proposed residence. The plan shall indicate that the special status plant species shall be transplanted to property currently in public ownership or proposed for preservation as part of the Del Monte Beach re-subdivision. This plan shall be incorporated into the Landscape Restoration Plan prepared by Thomas K. Moss, as referenced in Special Condition #1, and shall include similar post-construction monitoring to determine the success of the transplanting.
- 9. EVIDENCE OF WATER AVAILABILITY. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the Permittees shall submit written evidence to the Executive Director for review and approval that adequate water, which shall be provided only by and through the municipal water distribution system regulated by the California American Water Company in the City of Monterey according to the allocation procedures of the City and the Monterey Peninsula Water Management District, is available for the project. All relevant agency approvals, including approval from the Monterey County Public Health Department, if required, shall be provided.
- 10. CONSERVATION DEED RESTRICTION. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT,** the Applicants shall submit to the Executive Director, for review and approval, documentation demonstrating that the Applicants have executed and recorded against the parcel governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of the property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description of the entire parcel governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and the conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.



III. Recommended Findings and Declarations

The Commission finds and declares as follows:

A. Project Description

1. Project Location

The proposed project is located in the Del Monte Beach area of the City of Monterey, between Del Monte Boulevard and the ocean, in the high oceanfront Flandrian dunes (see Exhibit 1). The project site is the last undeveloped 3,600 square foot parcel located on Dunecrest Avenue west of Beach Way in the legally subdivided Del Monte Beach Tract #2 subdivision (see Exhibit 2). The project site is bordered by Dunecrest Avenue to the south, residences to the east and west, and open dunes to the north. Further east of the project lies the Del Monte Tract #1 subdivision, which is almost fully developed. The City's Del Monte Public Beach is located approximately 700 feet north of the project site (see Exhibit 3). The project site abuts the "Parcel B" open space area of the recently approved Del Monte Beach re-subdivision (see Exhibit 4).

The majority of the lots on Dunecrest Avenue were developed prior to the Coastal Act of 1976. Since 1990 the Commission has approved development of four other residences on this section of Dunecrest. All of these approvals were conditioned with a requirement to retain 50% of the lot as undeveloped open space for the reasons discussed in the findings regarding Environmentally Sensitive Habitats in section III(B) of this report.

2. Proposed Development

The Applicants propose to construct a two-story, 1,440 square foot single-family residence on a 3,600 square foot lot. The proposed project includes a two-car garage, basement, cantilevered decks, a rooftop deck, a fenced trash area, and retaining walls. Grading will be required to reduce the slopes of steep grades on the site, resulting in the removal of approximately 244 cubic yards of sand from the project site.

3. Project Area Background

The Del Monte Beach subdivision was created in 1918. The eastern two-thirds of the subdivision (Tract #1) is substantially developed. The perimeter of Tract #2 along Sea Foam and Dunecrest Avenue (location of the project site) has also been developed. Limited development has occurred in the western third (Tract #2) of the subdivision since 1918 (see Exhibit 3).

In 1976 the Coastal Commission denied proposed road and utility improvements to the undeveloped areas of Tract #2 (seaward of the project site), finding that there was a potential for impacts to the dunes and that the preservation and stabilization of the remaining coastal dunes were of critical concern in the



Coastal Act. During the late 1970's the State identified the undeveloped Tract #2 area for acquisition in order to expand beach parkland in the area; however, this proposal was abandoned due to lack of funding and unsuitability of the site for a State recreation area. The City later explored possible California Coastal Conservancy programs that might be used to acquire the property. These programs required willing sellers, but the City found that the majority of property owners were not interested in selling. In 1996 the City commissioned the Del Monte Beach Tract #2 Planning Study to identify and evaluate alternative development scenarios to determine if a development pattern other than the existing 3,600 square foot lot development would be preferable. The City Council's preferred alternative from the study was defined as seventeen 6,000 square foot lots between Dunecrest Avenue and the Monterey Bay.

The Del Monte Beach LUP, although not certified, acknowledges public opinion that open space use of vacant lots is the most suitable land use option for the Tract #2 area. The LUP recognizes that the habitat within the existing sand dunes is part of the rapidly diminishing sand dune ecosystem along the California coast. However, the City Council has taken the position that while open space is the most desirable land use for this area, realistic funding sources are limited. The City has previously purchased the front block of 22 lots closest to the Bay. In addition, the City has purchased a total of 12 ½ lots and the Regional Parks District has purchased a total of 9 ½ lots in the undeveloped dune area seaward of the project site.

In 1998 the City, the Monterey Peninsula Regional Park District, and private property owners signed a pre-development agreement to cooperatively pursue a re-subdivision into 10-13 lots in the vacant area on the bay side of Dunecrest Avenue and an 8-unit Planned Unit Development on the inland side of Dunecrest (subsequently changed to three new 5,000 square foot lots, zoned single-family residential). In April 2002 the Commission approved a re-subdivision consisting of eleven clustered single-family dwellings on the bay side of Dunecrest Avenue and three single-family dwellings on the inland side of Dunecrest Avenue. This re-subdivision includes preservation of habitat and contiguous areas of open space, and public access to coastal resources (see Exhibit 4).

4. Standard of Review/Basis of Decision

The City of Monterey does not have a certified LCP. Thus, the standard of review is conformance with the policies of the California Coastal Act. These policies include Section 30240, which prohibits any significant disruption of environmentally sensitive habitat areas, and bans those uses that are not dependent on such resources.

The entire Del Monte Beach dune area, including the parcel proposed for development, is environmentally sensitive coastal dune habitat (see finding III(B)(b) for details). Accordingly, because the proposed project will result in development of a single-family residence (which is not a resource-dependent use) and will result in habitat disruption, the proposed residential use cannot be found consistent with Section 30240. Therefore, absent other considerations, this project would have to be recommended for denial.



However, Coastal Act Section 30010 states:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

The Coastal Commission is not organized or authorized to compensate landowners denied reasonable economic use of their otherwise developable residential property. Therefore, to preclude claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit allows for development of this parcel to provide a reasonable economic use of this property. This determination is based on the Commission's finding in section III(B)(c) of this staff report, below, that this privately-owned parcel was purchased with the expectation of residential use, that such expectation is reasonable, that the investment was substantial, and that the proposed development is commensurate with such investment-backed expectations for the site.

B.Coastal Development Permit Determination

1. Environmentally Sensitive Habitat

a. Applicable Policies

Section 30240 of the Coastal Act states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Section 30250(a) of the Coastal Act states, in part:

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources...



b. Description of Sensitive Habitat

The Applicants' site is located in the Monterey Bay dunes (also known as the Seaside dune system). All substantial undeveloped areas within this strand of high dunes represent environmentally sensitive habitat, in various stages of disruption or recovery. Because the dune habitat ecosystem is a rapidly diminishing resource and is so easily disturbed, it is an acknowledged environmentally sensitive area. To properly recover and preserve viable dune habitat requires large contiguous tracts of dune for the establishment of a diverse native dune habitat.

The Monterey Bay dune system begins at the Salinas River and extends to the Monterey Harbor and is characterized by plant and animal species adapted to a maritime-influenced, sandy environment. This dune system crosses several governmental jurisdictions: Monterey County, the City of Marina, California State Parks, the former Fort Ord property, City of Sand City, City of Seaside, the City of Monterey, and the U.S. Naval Postgraduate School. The Coastal Zone boundary through this region primarily follows Highway 1, which is also generally the first public road paralleling the sea. The remnant high dunes inland of Highway 1 have suffered severe excavation impacts and are frequently already developed; those along the shoreline are largely undeveloped. Potential coastal dune development throughout the region is a significant issue.

The Applicants' site is located in the Del Monte Beach Tract #2 subdivision, a geographical area known for its occurrence of plant and animal species native and restricted to the Monterey Bay dune system, including those listed as endangered or threatened under Federal and/or State regulations. Sensitive habitats are defined by local, State, or Federal agencies as those habitats that support special status species, provide important habitat values for wildlife, represent areas of unusual or regionally restricted habitat types, and/or provide high biological diversity.

Residential development and recreational use have affected the dune landforms within the greater Del Monte Beach area. All substantial undeveloped areas within this strand of high dunes represent environmentally sensitive habitat, in various stages of disruption or recovery. Because the dune habitat ecosystem is a rapidly diminishing resource and is so easily disturbed, it is an acknowledged environmentally sensitive area.

Native vegetation in the Del Monte Beach dunes is representative of the coastal dune scrub plant community. In its natural, undisturbed condition, this particular plant community forms a relatively open assemblage of low to prostrate plants on sandy beaches and dunes. The central dune scrub and bare sand dunes are communities designated as high priority in the California Department of Fish and Game (CDFG) Inventory. These three plant communities also are recognized as sensitive in the City of Monterey's Del Monte Beach Land Use Plan (not certified).

Another reason that these dunes meet the Coastal Act definition of environmentally sensitive habitat is that they support a number of rare plant and animal species. A number of native plants known to occur in or near the Del Monte Beach dunes are either already listed, or are considered a species of special concern by the U.S. Fish & Wildlife Service (USF&WS) including: 1) Sand gilia (*Gilia tenuiflora ssp. arenaria*), which is federally listed as an endangered species, is state listed as threatened, and is



considered rare by the California Native Plant Society (CNPS); 2) Coast wallflower (*Erysimum ammophilum*), which is considered a species of special concern by USF&WS, is considered of limited distribution by CNPS, but is not state listed; 3) Monterey spineflower (*Chorizanthe pungens* var. *pungens*), which is federally listed as a threatened species and is considered rare by CNPS and CDFG, but is not state listed; and 4) Monterey paintbrush (*Castilleja latifolia*), which is considered a species of special concern by USF&WS and is considered of limited distribution by CNPS, but is not state listed.

The dunes also support a number of rare animal species. Dune buckwheat, a host plant for the Smith's blue butterfly (*Euphilotes enoptes smithi*), is found in the Del Monte Beach dunes area. Smith's blue butterfly is federally listed as endangered, and is known only from Monterey County.

The western snowy plover (*Charadrius alexandrinus nivosus*) is federally listed as a threatened species and is a California species of special concern. These birds forage along the shoreline and nest in the foredunes. The plovers are known to nest upcoast in Marina, and the State Department of Parks and Recreation has erected exclosures around the nests to prevent trampling of the eggs. U.S. Fish & Wildlife Service staff has documented nesting by snowy plovers in recent years along Del Monte Beach, south of the Monterey Beach Hotel, and north of the Ocean Harbor House condominiums. Flocks of wintering plovers have been observed on the beach in the vicinity of the project site. Therefore, as these threatened birds have been found in the Monterey Bay dune system, and the Del Monte Beach area contains the type of habitat favored by the Snowy Plover, it is expected that the Del Monte Beach Tract #2 area will provide additional breeding habitat as the species recovers.

The black legless lizard (*Anniella pulchra nigra*) is a California species of special concern that inhabits coastal dunes in Monterey County between the Salinas and Carmel Rivers. This lizard burrows into loose sand under plants including bush lupine, mock heather, and mock aster. Lizards have been sighted in the Del Monte Beach dune area in 1996 and 1999.

Each of the above-listed plant and animal species is either migratory or intermittent in occurrence. Thus one or more of the above species may occupy a specific site in the dunes periodically. This explains why species that are not found in a specific location one year may be found in that location in subsequent years. This also explains why the entire dune system (and not just the particular location where a rare plant may be growing in a particular year) must be considered an environmentally sensitive habitat area (ESHA).

c. Implementing Sections 30010 and 30240 of the Coastal Act

As described above, the entire area of the Del Monte Beach dunes is environmentally sensitive dune habitat. The proposed development includes development of a 1,440 square foot, two-story single-family residence and includes grading and excavation of approximately 244 cubic yards of material.

None of these development activities are dependent on a location within the sensitive resource area. In addition, this development and its associated activities, individually and collectively, will result in a significant disruption of the environmentally sensitive dune area on site. Therefore, this project cannot



be found consistent with Coastal Act Section 30240.

Coastal Act Section 30240, however, must be applied in the context of other Coastal Act requirements, particularly Section 30010. This section provides that the policies of the Coastal Act "shall not be construed as authorizing the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation." Thus, if strict construction of the restrictions in Section 30240 would cause a taking of property the section must not be so applied and instead must be implemented in a manner that will avoid this result.

Recent court decisions demonstrate that to answer the question whether implementation of a given regulation to a specific project will cause a taking requires an ad hoc factual inquiry into several factors. Specifically, the courts have consistently indicated that this inquiry must include consideration of the economic impact that application of a regulation would have on the property. A land use regulation or decision may cause a taking if it denies an owner all economically viable use of his or her land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 112 S. Ct. 2886; also see *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Another factor that must be considered is the extent to which a regulation or regulatory decision "interferes with reasonable investment backed expectations." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, supra, 480 U.S. 470, 495, citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175.)

In addition, in order to avoid allegations of a taking, certain types of mitigation measures, such as exactions requiring the dedication of a fee interest in property, must be "roughly proportional" to the impact remediated. (*Dolan v. City of Tigard* (1994) 114 S. Ct. 2309.)

Other factors that may be reviewed in conducting a takings analysis include whether the land use regulation substantially advances a legitimate state interest. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825.) This is not a significant consideration in analyzing this permit application because the state's interest in protecting environmentally sensitive habitats is well recognized.

Finally, in still other individual cases it may be necessary to consider whether the property proposed for development by the applicant is subject to existing limitations on the owner's title, such as prescriptive rights, that might preclude the applied for use, or that the proposed use would be a nuisance. The question as to whether the project site is subject to prescriptive rights will be dealt with below in a subsequent discussion of public access and recreation issues. Furthermore, development of the parcel in its proposed configuration would not constitute a nuisance.

In this situation, the Del Monte Beach Tract #2 was initially subdivided into very small (3,600 sq. ft.) parcels for residential purposes. Currently, this is the last undeveloped parcel on this section of Dunecrest Avenue. The Applicants submitted adequate financial information to demonstrate that they have a sufficient real property interest in the parcel to allow development of the parcel. Staff has determined that the Applicants purchased the property in 1997, for which they paid fair market value. In 1997 this parcel and other parcels in the Tract #2 subdivision were designated (and continue to be



designated) in the General Plan and zoned for single-family residential use. Thus the Applicants, upon determining the zoning of Tract #2 and the developed nature of Dunecrest Avenue and Tract #1, could have legitimately assumed that development of a single-family home on this parcel was a reasonable expectation. Continued development within the Tract #2 subdivision since 1997 and the recent approval of the Del Monte Beach re-subdivision lends further credence to that expectation. Therefore, in view of the other existing and proposed residential uses in the immediate vicinity of this parcel, the Commission finds that the proposed residential use is a reasonable economic use, and also that the resource dependent uses allowed by Coastal Act Section 30240 would not provide an economic use.

In view of the findings that (1) none of the resource dependent uses provided for in Section 30240 would provide an economic use, (2) residential use of the property would provide an economic use and (3) the Applicants had a reasonable investment-backed expectation that such use would be allowed on the property, the Commission further finds that denial of a residential use, based on the inconsistency of this use with Section 30240, could constitute a taking. Therefore, consistent with Coastal Act Section 30010 and the Constitutions of California and the United States, the Commission determines that full implementation of Section 30240 to prevent residential use of the subject property is not authorized in this case.

Having reached this conclusion, however, the Commission also finds that Section 30010 only instructs the Commission to construe the policies of the Coastal Act, including Section 30240, in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on permit applications.

Moreover, while the Applicants may have reasonably anticipated that residential use of the subject properties might be allowed, the Coastal Act and recent Coastal Commission actions on similarly situated lots in the Del Monte Beach Tract #2 (including the recently approved Del Monte Beach re-subdivision) provided notice that such residential use would be contingent on the implementation of measures necessary to minimize the impacts of development on environmentally sensitive habitat. Thus, the Commission must still comply with the requirements of Section 30240 by protecting against the significant disruption of habitat values at the site, and avoiding impacts that would degrade these values, to the extent that this can be done consistent with the direction to avoid a taking of property. Mitigations must also be generally proportionate to the adverse impacts caused by development of a single-family residence.

d. Habitat Values of the Project Site

A botanical survey report was prepared for the site (see Exhibit 6 for survey summary). The report describes the existing vegetation on the project site, evaluates potential environmental impacts, and recommends various measures to mitigate any identified impacts. According to the botanical survey, the project site is in a severely degraded condition. With the exception of the eastern, western, and southern margins, the property is denuded of vegetation. A number of native plant species, however, have spread from adjacent properties onto the eastern and western margins of the project site. Two of these species are protected plant species: Coast wallflower (*Erysimum ammophilum*) and Monterey spineflower



(*Chorizanthe pungens* var. *pungens*). Specifically, four groups of Monterey spineflower (a total of 66 individuals) were distributed along the western and eastern property lines. An individual coast wallflower was found midway along the eastern property line. No other plants of special concern were observed at the time of the survey. Also, no dune buckwheat (a host plant for the Smith's blue butterfly) was found on or near the project site. The presence of the Monterey spineflower and the coast wallflower, however, confirms the importance of the site as environmentally sensitive habitat.

No survey was conducted to determine the presence of black legless lizards on the project site. The project botanist determined that low-quality habitat for the black legless lizard occurs along the western and eastern property lines in an area of some native vegetation.

e. Potential Impacts and Mitigation

As stated above, the parcel proposed for development is 3,600 square feet in size. The proposed project will result in a net reduction of environmentally sensitive habitat area totaling 1,710 square feet (includes house, walks, decks, and driveway), which represents 47.5% of the property. The remaining 1,890 square feet (52.5% of the parcel) will remain in open space. According to the botanical survey, the proposed project will result in the unavoidable loss of two of the smaller groups of Monterey spineflower (a total of 11 plants), as well as the individual coast wallflower. This assessment is based on the assumption that all plants within ten feet of the building footprint and paved surfaces will be eliminated during construction. In the botanist's experience, it is not possible to prevent disturbance within ten feet of new construction. Given that approximately 244 cubic yards of sand will be excavated from the project site, the area impacted is likely to be even greater.

Other potential impacts to species of special concern and their habitat resulting from the proposed project include shading cast by the proposed residence, trampling incidental to residential use, and the introduction of nonnative plant species.

In view of the findings in section III(B)(c) that: (1) none of the resource dependent uses provided for in Section 30240 would provide an economic use; (2) residential use of the property would provide an economic use; and (3) the Applicants had a reasonable investment backed expectation that such use would be allowed on the property, the Commission further finds that denial of a residential use, based on the inconsistency of this use with Section 30240, could constitute a taking. Therefore, consistent with Coastal Act Section 30010 and the Constitutions of California and the United States, the Commission determines that full implementation of Section 30240 to prevent residential use of the subject property is not authorized in this case.

Having reached this conclusion, however, the Commission also finds that Section 30010 only instructs the Commission to construe the policies of the Coastal Act, including Section 30240, in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on permit applications.

Moreover, while the Applicants in this instance may have reasonably anticipated that residential use of



the subject property might be allowed, the Coastal Act and the April 2002 Commission action on the Del Monte Beach re-subdivision, as well as Commission action on individual lots in Tract #2 in recent years (Kass, Boyden, Bram, Seawald, Archer, Archer/Nichols, and Gamble), provided notice that such residential use would be contingent on the implementation of measures necessary to minimize the impacts of development on environmentally sensitive habitat. Thus, the Commission must still comply with the requirements of Section 30240 by protecting against the significant disruption of habitat values at the site, and avoiding impacts that would degrade these values, to the extent that this can be done consistent with the direction to avoid a taking of property. Mitigations must also be generally proportionate to the adverse impacts caused by development of the house and associated infrastructure.

MITIGATION: In situations such as these, there are several conditions that the Commission can adopt that implement Section 30240 without taking the Applicants' property. Appropriate measures include: concentrating residential site coverage so that development covers no more than one-half (1800 sq. ft.) of the parcel; and requiring that the area of the parcel that will not be developed (1800 sq. ft. minimum) shall be preserved in open space, subject to a conservation deed restriction. Special Conditions 3 and 10 of this permit require such measures.

Even with these conditions, development on the parcel will permanently displace dune habitat and prevent revegetation on up to 50% of the lot. There also will be indirect impacts on the undeveloped portions of the lot through construction activity, shadowing and other activities associated with adjacent residential use. Moreover, although the actual square footages at issue in this permit are relatively small (1,710 sq. ft. developed, with the remainder of the lot designated as open space), these impacts are significant given the importance of the Monterey Bay Dune system as a whole. Therefore, several additional conditions are necessary to offset these direct, indirect, and cumulative project impacts.

The Applicants have submitted a landscape restoration plan containing a number of impact assessment and mitigation measures designed to protect existing dune resources (see Exhibit 7 for restoration implementation schedule). Special Condition 1 requires that project construction activities, and future use of the site, comply with these recommendations. In addition, Special Condition 8 requires transplantation of any special status plant species on site (that will be impacted by construction) to a preservation area.

In addition, because the developed half of the lot represents a permanent loss of environmentally sensitive habitat, the permit also has been conditioned in Special Condition 2 to require project mitigation through an in-lieu fee. The purpose of the in-lieu fee is to provide for offsite restoration of degraded environmentally sensitive habitat, to mitigate onsite loss of environmentally sensitive habitat (the lot is too small for substantive onsite restoration). More specifically, the in-lieu fee will provide funds to pay for the cost of restoring an area exactly proportionate to the area of environmentally sensitive habitat that will be destroyed due to construction of the house. The in-lieu fee will be used for future native plant habitat preservation and restoration in nearby dune areas through the acquisition of restoration sites, eradication of invasive exotic vegetation, installation of boardwalks, and other dune restoration measures identified in the planning or LCP process.



The amount of the in-lieu fee is based on a current estimate made by dune restoration botanist Thomas Moss, a local expert in preparing and implementing dune restoration. Mr. Moss estimates that the projected cost of restoration of an acre is approximately \$15,000. For the 1,710 square foot area to be covered by the proposed residential development, the proportional cost is \$589. The City of Monterey, which has already established a fund for the protection of the Monterey Dunes, would be the recipient of these funds. As conditioned, the expenditure of such funds would be subject to review by the Executive Director to ensure conformance with the intended habitat protection and restoration purposes of this condition.

To address the potential taking of the Black legless lizard, a rare and sensitive dune animal that is considered a species of special concern by the California Department of Fish and Game (and previously a candidate for listing as endangered by the U.S. Fish and Wildlife service), Special Condition 7 requires the project site to be surveyed for these lizards by the project biologist prior to the commencement of construction, and on a daily basis until grading is completed. If found, the lizards must be captured and immediately placed into containers with moist paper towels, and released in similar habitat on undisturbed portions of the site at the same depth in the soil as when found.

Finally, in order to protect the unique sands of the Monterey Dunes, on which sensitive native habitats depend, as well as to prevent spoils disposal from adversely impacting other sensitive habitat areas, Special Condition 5 requires the Permittees to identify a disposal site for excavated sand within the Monterey Dunes system, as well as a disposal method, subject to the review and approval of the City of Monterey, the project biologist, and the Executive Director.

Conclusion: The area of the Seaside (Monterey Bay) Dunes in which the Applicants' parcel is located is an environmentally sensitive habitat area within the meaning of Section 30240 of the Coastal Act. This section of the Act requires that such habitat areas be protected against significant disruption or degradation. Strict application of this section is not authorized in this situation, however, because to do so would cause a taking of property in violation of Section 30010 of the Coastal Act, as well as the State and United States Constitutions. Therefore, the Applicants may be permitted to develop their parcel, subject to Special Conditions that will reduce or mitigate the project's impact on dune habitat to the maximum extent feasible. As so conditioned, the project will be consistent with the habitat preservation policies of the Coastal Act.

2. Public Access and Recreation

The Applicants' sand dune site lies between the first public road and the sea. It is contiguous with and indistinguishable from the adjacent dune field, which extends seaward about 700 ft. to the City beach.

Section 30604(c) of the Coastal Act requires that the Commission make specific findings of consistency of such development with the public access and recreation policies of the Coastal Act. Section 30001.5 of the Coastal Act states, in part, that one of the basic goals of the state for the coastal zone is to:

(c) Maximize public access to and along the coast and maximize public recreational



opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners.

Section 30211 of the Coastal Act states:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30210 of the Coastal Act states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30221 of the Coastal Act states:

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30222 of the Coastal Act gives priority to visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation over private residential, general industrial, or general commercial development; and Section 30223 reserves upland areas necessary to support coastal recreational uses where feasible.

The Commission has a long history of grappling with the issue of public access in Del Monte Beach Tract #2. The findings adopted by the Commission for a 1992 LUP submittal found that the seven and one-half acre Del Monte Beach Tract #2, which includes the project site, has been subject to public use for many years. To finally resolve the question of the extent of potential prescriptive rights existing in this area, the LUP modifications adopted by the Commission required the City to prepare such a study.

While the Commission approved the LUP in 1992 with this and other modifications, the City did not accept these modifications within the six-month time limit; therefore, certification of the resubmitted LUP did not occur and the City declined to conduct a prescriptive rights study (the City's LUP has been re-submitted and is under review at this time). Thus, the Commission must review this application for conformance with the Coastal Act and without the benefit of a prescriptive rights study. Accordingly, it is concluded that the evidence for the subject parcel is indeterminate. Lacking the necessary information, the Commission is unable to find unequivocally that this property has been dedicated entirely or partly for public use.

Recent actions by the Commission have helped to resolve the public access issue in Del Monte Beach



Tract #2. In April 2002, the Commission approved the Del Monte Beach re-subdivision. This project will allow the development of 11 homes in the Del Monte Shores portion of the re-subdivision (located seaward of the project site). Approximately 68% of the Del Monte Shores site will go into public ownership and will consist of two public open space/habitat areas: Parcel "A" and Parcel "B" (see Exhibit 4). Boardwalks on Parcel "A" will provide public access to the beach with two access points from Beach Way and a single access from Spray Avenue. These boardwalks will direct public access through the dunes consistent with protection of the surrounding dune habitat.

Given that the Commission is unable to find unequivocally that this property has been dedicated entirely or partly for public use and given the recent approval of the Del Monte Beach re-subdivision with associated public access improvements, this approval is not conditioned to require public access through the project site. This is supported by the fact that public access has not been a condition of approval in previous Commission actions for development of single-family homes along Dunecrest Avenue. However, because the issue of prescriptive rights in Tract #2 has not been formally resolved, previous approvals along this section of Dunecrest Avenue have included a condition that states that issuance of the permit shall not constitute a waiver of any public rights that may exist on the property. This approval is conditioned similarly (see Special Condition 4). Therefore, to this extent, any historic rights of access that may exist will be protected in the undeveloped area of the lot. As so conditioned, public access impacts are mitigated to the extent feasible, and the project is consistent with the public access requirements of the Coastal Act.

3. Scenic Resources

Section 30251 of the Coastal Act states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The 3,600 sq. ft. project site is the last undeveloped parcel on Dunecrest Avenue, west of Beach Way. The proposed structure is a two-story 1,440 square foot single-family dwelling with a two-car garage, basement, cantilevered decks, a rooftop deck, and a fenced trash area. As approved by the City, the house will be a maximum height of 26 ½ feet above finished grade (see Exhibit 5 for project plans).

As submitted, the building's proposed design, scale, and siting on the parcel are consistent with the residential development in the almost fully built out Del Monte Beach Tract #1 to the east. The building would also be consistent with existing residences in Tract #2. Views north and west from Dunecrest Avenue are partially restricted by existing development and vegetation, but some views to the Naval



Postgraduate School dunes and beach and the City of Monterey shoreline are available. The proposed development will slightly encroach into these views and may (distantly) impact the views from the public beach to the north, although the view from the beach will be impacted somewhat in the future by development of the Del Monte Beach re-subdivision.

The City has not defined the type of fencing that will be allowed on this site. The Applicants will be required to have additional architectural review prior to issuance of the building permit and fencing will be addressed at that time. Thus this permit is conditioned to require that any permanent fencing, as well as landscaping, will not substantially impair public views of the dunescape (see Special Condition 3). Therefore, as conditioned to restrict fencing that would block or damage public views of the scenic dunescape, the proposed development is consistent with the scenic resource policies of the Coastal Act.

4. Geologic Hazards

Section 30253 of the Coastal Act states:

New development shall: (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard; (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The Applicants' site lies on the crest of the Flandrian (late Pleistocene era) dune field that rises from 30 to 80 feet in elevation in this area. Applicable policies in the (uncertified) Del Monte Beach Land Use Plan require site-specific geology/erosion studies, a development setback sufficient to prevent damage from both the expected 100-year shoreline erosion rate and the 100-year storm or tsunami run-up, and preservation of sand dunes wherever feasible.

Because of its distance from the shoreline (approximately 700 ft.), no shoreline erosion rate study was done. However, the potential geotechnical hazards to manmade structures at this site, including ground shaking, ground rupture, landsliding, liquefaction, lateral spreading, and differential compaction, were considered by a geotechnical analysis completed by Tharp & Associates, Inc. in May 2001. Based on this geotechnical evaluation, it was determined that the subject site is suitable for the proposed development provided that the recommendations presented in the report are implemented during grading and construction. Special Condition 6 requires compliance with the recommendations contained in the Tharp & Associates, Inc., May 2001 report. With this condition, the proposed re-subdivision is consistent with Section 30253 of the Coastal Act regarding geologic hazards.

5. Public Services

Section 30250 of the Coastal Act states, in part:

(a) New residential, commercial, or industrial development, except as otherwise provided in this



division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources...

Section 30254 states, in part:

...Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

The subject parcel is located on Dunecrest Avenue, a developed street with existing utilities. Vehicular access for the Tract #1 and Tract #2 subdivisions and the public beach is limited to a single entrance off Del Monte Avenue and a narrow loop road system. However, the development of this residence by itself will have an insignificant impact on traffic volume.

The Monterey Peninsula Water Management District (MPWMD) allocates water to all of the municipalities on the Monterey Peninsula. The actual water purveyor is the California American Water Company (Cal Am). Each municipality allocates its share of the water to various categories of development, such as residential, commercial, industrial, etc. Water is currently not available for the project. The Applicants were placed on the City's Water Waiting List on 10/12/01 and are currently # 5 on this list (see Exhibit 8). The City of Monterey evaluates this list periodically and allocates water as it becomes available due to new sources or when previously approved projects do not go forward and the water from those projects is re-allocated. The City has had a water waiting list for approximately the past three years. Over that time, the waiting list has been cleared twice (personal communication with City staff).

Coastal Act Section 30250 directs development to be located in or near an area with sufficient resources to accommodate it. The residential lot is located in an area serviced by the Cal Am Water Company. The Applicants have applied and are on the City's Water Waiting List. Given that the list has cleared twice in the last three years, it is reasonable to expect that the City will be able to grant the Applicants a water permit within the two-year time period of this permit. However, evidence of such a water assignment is required prior to issuance of the permit in order to comply with Section 30250. With the inclusion of Special Condition 9, which requires evidence of water availability prior to issuance of the coastal development permit, the project is consistent with Coastal Act Section 30250 regarding water supply. In the event that the permit is not issued within the next two years, and an extension is requested, the absence of a water assignment may constitute a changed circumstance in light of the water constraints in the Monterey Peninsula area.



IV. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

In response to the environmental review requirements of CEQA, the City certified a Negative Declaration for this project on December 11, 2001. Additional impacts were discovered during the course of this permit review and the recommendation is incorporated in its entirety in this finding. In response, additional mitigation measures are incorporated as conditions. Accordingly, as so conditioned and modified, the Commission finds that the proposed project is consistent with CEQA, as all of its significant environmental impacts will be reduced to a level of insignificance. All public comments received have been addressed.

